

**OFFICIAL SHORT CITATION NAME:** When referring to 2008 OEA 34 cite this case as  
*Walnut Grove Dairy, 2008 OEA 34.*

**TOPICS:**

water  
NPDES  
CAFO  
discovery  
dismissal  
default  
trial rules

**PRESIDING JUDGE:**

Dauidsen

**PARTY REPRESENTATIVES:**

Petitioners: Todd Janzen, Esq. John Lloyd, Esq.  
Respondent: David Hatchett, Esq., Eric Essley, Esq.  
IDEM: April Lashbrook, Esq.

**ORDER ISSUED:**

April 11, 2008

**INDEX CATEGORY:**

Water

**FURTHER CASE ACTIVITY:**

[none]

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**Objections to Issuance of Confined Animal Feeding Operation NPDES CAFO No. INA006440,  
AW No. 5718/Farm ID No. 6440, Walnut Grove Dairy, LLC, Angola, St. Joseph County, Indiana  
2008 OEA 34 (07-W-J-3874)**

STATE OF INDIANA )  
 )  
COUNTY OF MARION ) BEFORE THE INDIANA OFFICE OF  
 ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
OBJECTIONS TO THE ISSUANCE OF CONFINED )  
FEEDING OPERATION NPDES CAFO NO. INA006440 )  
AW NO. 5718 / FARM ID NO. 6440 )  
WALNUT GROVE DAIRY, LLC, )  
ANGOLA, ST. JOSEPH COUNTY, INDIANA. )  
 ) CAUSE NO. 07-W-J-3874  
Ken Carbiener, Karol & Dean Carbiener, )  
Kathleen & Mark Neal, Jeri Vitello, Peter Daly, )  
Susan & Carl Lestinsky, and Marge & Robert Larracuenta, )  
Petitioners, )  
Walnut Grove Dairy, LLC, )  
Respondent/Permittee, )  
Indiana Department of Environmental Management, )  
Respondent. )

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER OF DEFAULT  
ON MOTIONS TO DEFAULT AND DISMISS PETITION FOR ADMINISTRATIVE  
REVIEW**

This matter came before the Indiana Office of Environmental Adjudication (“OEA” or “Court”) on August 24, 2007 on Respondent/Permittee Walnut Grove Dairy, LLC’s (“Walnut Grove”) Motion for Default; on September 4, 2007, on Petitioners’ Response to Respondents Motion for Default; on September 10, 2007 on the Indiana Department of Environmental Management’s (“IDEM”) Motion for Default Judgment and Motion to Strike Petitioners’ Response to Respondent’s Motion to Dismiss; on January 4, 2008 on Walnut Grove’s Renewed Motion for Default; and on March 13, 2008 on Walnut Grove’s Supplement to its Previously Filed Motions for Default.

**AND THE COURT**, being duly advised and having considered the petitions, pleadings, motions, evidence and the briefs, responses and replies, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

**Findings of Fact**

1. IDEM’s January 26, 2007 National Pollution Discharge Elimination System (“NPDES”) Permit No. INA006440 (“Permit”) authorized Walnut Grove to construct and operate a concentrated animal feeding operation (“CAFO”) near the intersection of Ironwood Road and Shively Road in Angola, St. Joseph County, Indiana.

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2. Petitioners filed a Petition for Administrative Review on February 13, 2007. A Case Management Order was issued after the March 14, 2007 Prehearing Conference. Dates were modified at the Petitioners' and Walnut Grove's request and stated in the June 18, 2007 Amended Case Management Order. On March 30, 2007, Petitioners moved for and received an extension of the preliminary witness and exhibit list submission date.
3. The parties do not dispute that, without Court direction or involvement, an allowed procedure, Walnut Grove tendered discovery to Petitioners on or about May 30, 2007, with Petitioners' responses due thirty days thereafter. On July 24, 2007, Walnut Grove sent Petitioners a written inquiry as to when Petitioners would respond to discovery, and averred that Petitioners did not respond.
4. The issue of Petitioners' failure to respond to discovery was brought before the Court in Walnut Grove's Motion for Default and Motion to Dismiss; no other discovery-related motions were filed before the Court, such as a Motion to Compel or motions addressing scheduling.
5. As stated in the June 18, 2007 Amended Case Management Order, Walnut Grove filed its Motion to Dismiss specified claims (a), (e), (f), (g), (i), (j), (l), and (m) and petitioners Kathleen and Mark Neal, along with a supporting brief on July 25, 2007. Per the Amended Case Management Order, Petitioners' Response was due by August 14, 2007, Walnut Grove's Reply and Motion for Oral Argument on dispositive motions (if so elected) was due by August 24, 2007, and Proposed Findings of Fact, Conclusions of Law and Order were due by August 29, 2007.
6. Due to Petitioners' lack of filing a Response by August 14, 2007, lack of discovery response, and Petitioners' lack of action for more than sixty days, Walnut Grove filed a Motion for Default Judgment against all Petitioners for all claims on August 24, 2007.
7. Petitioners filed their Response to Respondent's Motion for Default and Response to Respondent's Motion to Dismiss on September 4, 2007. The September 4, 2007 Responses were filed later than authorized in the Court's June 18, 2007 Amended Case Management Order. The Responses stated that the Petitioners wished to continue their administrative appeal of the Permit on the merits, that their discovery responses were contemporaneously filed, and that Petitioners were ready to proceed to hearing as scheduled on September 20, 2007. Petitioners also filed a final witness and exhibit list on September 7, 2007.
8. IDEM's September 10, 2007 Motion for Default Judgment and Motion to Strike Petitioners' Response to Respondents' Motion to Dismiss, was based upon Petitioners' lack of excusable neglect or explanation for lateness, failure to seek extensions to file discovery responses and to respond to the Motion to Dismiss.

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9. The Court issued a New Amended Case Management Order on November 5, 2007, providing Petitioners with opportunity to address the pending Motions for Default and Dismissal. Petitioners did not submit responses as provided in the November 5, 2007 Case Management Order, nor did they seek extensions to do so, or leave not to respond.
10. Respondent Walnut Grove's January 24, 2008 Renewed Motion for Default and its March 13, 2008 Supplement to its Previously Filed Motions for Default averred that Petitioners' discovery responses were untimely, incomplete and unverified, and such alleged defects have not been corrected by Petitioners after notice was provided of such defects. Respondent Walnut Grove further averred that Petitioners further failed to respond to a November 19, 2007 Subpoena Duces Tecum issued to Petitioners' expert witness Kathy J. Martin, P.E. Petitioners did not submit responses to Respondent Walnut Grove's allegations, nor did they seek extensions to do so, or leave not to respond.
11. All of the Court's Case Management Orders contained the provision, "A party who fails to participate in any later stage of this proceeding may be held in default or may have the proceeding dismissed."

**Conclusions of Law**

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the agency actions of the Indiana Department of Environmental Management and the parties to this controversy pursuant to IC 4-21.5-7, *et seq.*, and 315 IAC 1, *et seq.*
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"), and deference to the agency's initial factual determination is not allowed. *Id.*; IC 4-21.5-3-27(d). "De novo review" means that "all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).
4. This was held to be directly applicable to the Office of Environmental Adjudication in *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind.App. 2005). In this case, the ELJ specifically concluded that she must give deference to the agency's interpretation. The Appellate Court reversed OEA's decision because the ELJ used the wrong standard of review. The Court stated that the ELJ mistakenly applied the appellate standard of review rather than a *de novo* standard of review. *Id.* The OEA must apply a *de novo* standard of review when making findings of fact and conclusions of law and may not defer to IDEM's findings or conclusions.

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5. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also*, IC 4-21.5-3-27(d). OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” IC 4-21.5-3-23(b). Standard of proof generally has been described as a continuum with levels ranging from a “preponderance of the evidence test” to a “beyond a reasonable doubt” test. The “clear and convincing evidence” test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test. *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The “substantial evidence” standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind.Ct.App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also*, *Blue River Valley*, 2005 OEA 1, 11-12, *Marathon Point Service and Winamac Service*, 2005 OEA 26, 41.
6. While IC 4-21.5-3-24 addresses procedures, such as filing deadlines, for motions to dismiss and to default, substantive provisions of Indiana’s Rules of Trial Procedures have been applied to motions to dismiss and default adjudicated before the OEA. 315 IAC 1-3-18.
7. In addition, IC 4-21.5-3-24 grants the ELJ the discretion to notify the parties of a proposed default and to allow the party in default an opportunity to respond and show cause why he or she should not be held in default. *See also*, 315 IAC 1-3-7(b); Ind. Tr. R 55(A). The responsive pleading periods stated in the Court’s multiple Case Management Orders provided Petitioners with their opportunities to respond and show cause as to why they should not be held in default. Unrefuted substantive evidence has been presented that, as to Motions filed after September 4, 2007, Petitioners did not utilize these opportunities, nor did they seek extension to respond, or leave not to respond, and are subject to dismissal.

**Final Order**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Respondent/Permittee, Walnut Grove Dairy, LLC's and Indiana Department of Environmental Management's Motion for Default Judgment is **GRANTED**. All pending proceedings are hereby **VACATED**.

**IT IS FURTHER ORDERED** that Indiana Department of Environmental Management's Motion to Strike Petitioners' Response to Respondent's Motion to Dismiss is **DENIED**.

You are hereby further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5, *et seq.* Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this non-final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED in Indianapolis, Indiana, this 11th day of April, 2008.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge